No. 78-1025

In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL HENRY PARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 582 F. 2d 953.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1978. A petition for rehearing was denied on November 22, 1978. The petition for a writ of certiorari was filed on December 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the conspiracy count of petitioner's indictment should have been dismissed on grounds of double jeopardy.

STATEMENT

Petitioner was the president of Teamsters Union Local No. 385, which was involved in an organizational struggle marred by a series of bombing incidents in 1971 in Orange and Lake Counties, Florida. Petitioner was charged with and convicted of unlawful involvement in these bombings, and his conviction was affirmed on appeal. *United States* v. *Parker,* 586 F. 2d 422 (5th Cir. 1978). The specific counts were: (1) inducing others maliciously to damage a building by explosive (18 U.S.C. 844(i)); (2) inducing others unlawfully to possess destructive devices (26 U.S.C. 5861); and (3) conspiracy (18 U.S.C. 371) to violate 18 U.S.C. 844(i), 26 U.S.C. 5861 and 18 U.S.C. 842(a)(3)(A) (unlawful transportation of explosives) (Pet. App. A–3; Pet. 4).

In 1977, a federal grand jury sitting in Orlando, Florida, returned another multi-count indictment charging petitioner and Thomas Larkin, the Teamster Local's attorney, with a conspiracy to cover up the involvement of petitioner and other union officials in the bombing campaign. The indictment alleged that the conspiracy had five objectives: obstruction of criminal investigations (18 U.S.C. 1510), obstruction of justice (18 U.S.C. 1503), subornation of perjury (18 U.S.C. 1622), embezzlement of union funds (29 U.S.C. 501(c)), and falsification of union records (29 U.S.C. 439 (b) and (c)). The remaining 12 counts charged specific acts of embezzlement and falsification of union records and reports. The conspiracy was alleged to have begun in February 1971 and to have continued

until the date of the indictment, October 27, 1977. This is contrasted with the conspiracy in the first indictment, which began on February 25, 1971, and ended by April 16, 1971, according to that indictment. Petitioner and two other persons, David Wingate and Ashley Burch, Jr., were named as defendants in the first indictment, whereas petitioner and Larkin were the only indicted co-conspirators in the second (Pet. App. A–3; Pet. 5).

Petitioner moved to dismiss the second indictment on double jeopardy grounds. The district court denied the motion and the court of appeals affirmed (Pet. App. A–1 to A–5).

ARGUMENT

We note at the outset that petitioner's double jeopardy argument relates solely to the conspiracy count of the second indictment and not to the 12 additional substantive counts. Petitioner makes no attempt to support his broad conclusion (Pet. 21) that the entire second indictment should be dismissed along with the conspiracy count. In any event, petitioner's argument regarding the conspiracy count is insubstantial.

1. In support of his claim that the two conspiracies were actually one, petitioner relies (Pet. 6–8) on evidence presented to the grand jury that returned the first indictment as well as evidence presented at the ensuing trial indicating that petitioner and his subordinates attempted to cover up petitioner's involvement in the bombings from the very beginning of the

first conspiracy. However, as the court of appeals observed (Pet. App. A–5), "[t]he fact that evidence of the offenses charged in the current indictment was admitted at the earlier trial does not, by itself, implicate the double jeopardy clause, as those offenses were not charged in the first indictment." [1]

After weighing all the evidence presented by petitioner, the district judge who presided over the first trial rejected the claim that there was only one conspiracy, and the court of appeals agreed with that conclusion (Pet. App A–4 to A–5). As the court of appeals noted (*id.* at A–5; footnote omitted):

> Although there is some overlap in the time the conspiracies are charged to have existed, and in the participants in these conspiracies, the overlap is not significant for double jeopardy purposes. Different overt acts are charged, and the underlying objectives are distinct. The second indictment charged a wide-ranging scheme affirmatively and unlawfully to interfere with the processes of justice, rather than a simple continuation of the bombings conspiracy.

This essentially factual determination does not warrant further review. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635–636 (1967).[2]

[1] This Court has pointed out that an agreement to cover up criminal activities normally may not be implied from an agreement to engage in those activities. *Grunewald* v. *United States*, 353 U.S. 391 (1957).

[2] Petitioner's reliance upon *Braverman* v. *United States*, 317 U.S. 49 (1942), is misplaced. In *Braverman* it was conceded that there was only a single agreement, but the case was submitted to the jury on the erroneous theory that "the conspirators are guilty of as many offenses as the agreement has criminal objects." *Id.* at 53. Here the courts below properly concluded that there were two substantially distinct agreements involving different conspirators and objectives. See, *e.g.*, *United States* v. *Ingman*, 541 F. 2d 1329, 1330 (9th Cir. 1976); *United States* v. *Bommarito*, 524 F. 2d 140, 146 (2d Cir. 1975); *United States* v. *Westover*, 511 F. 2d 1154, 1156 (9th Cir.), cert. denied, 422 U.S. 1009 (1975); *United States* v. *Prince*, 515 F. 2d 564, 567 (5th Cir.), cert. denied, 423 U.S. 1032 (1975). Moreover, petitioner's assertion (Pet. 14) that "the Fifth Circuit clings tenaciously to a restrictive view of the important personal protection against double jeopardy" when single conspiracy claims are presented is incorrect. See *United States* v. *Ruigomez*, 576 F. 2d 1149 (5th Cir. 1978).

2. Petitioner also contends (Pet. 10–16) that there is a conflict among the circuits on the issue of who has the burden of proof when a double jeopardy claim is raised. In *United States* v. *Inmon*, 568 F. 2d 326 (1977), the Third Circuit held that when a defendant makes a non-frivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy, the burden of establishing separate crimes is on the government. The traditional rule, followed by most of the circuits that have addressed the issue, places the burden of proof on the defendant. See *United States* v. *Rumpf,* 576 F. 2d 818, 823 (10th Cir.), cert. denied, No. 78–93 (Oct. 10, 1978); *United States* v. *Westover*, 511 F. 2d 1154, 1156 (9th Cir.), cert. denied, 422 U.S. 1009 (1975); *United States* v. *O'Dell*, 462 F. 2d 224, 226–227 n.2 (6th Cir. 1972); *United States* v. *Wilshire Oil Co.*, 427 F. 2d 969, 976 n.12 (10th Cir.), cert. denied, 400 U.S. 829 (1970); *Rothaus* v. *United States,* 319 F. 2d 528, 529 (5th Cir. 1963). The rule in the Second Circuit is unclear. Compare *United States* v. *Mallah*,

503 F. 2d 971, 985–987 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975), with *United States* v. *Seijo*, 537 F. 2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043 (1977).

As petitioner recognizes (Pet. 14), the court of appeals in this case declined to decide which rule is correct because the district court "explicitly found that defendant had not made * * * a 'non-frivolous showing'" of double jeopardy (Pet. App. A–4). By the same token, there is no need for this Court to resolve the issue here, since petitioner could not prevail even under the Third Circuit's rule. In any event, it is doubtful whether the issue is of sufficient importance to warrant this Court's attention. Most double jeopardy claims raise purely legal questions and therefore do not involve any issue as to burden of proof. See *United States* v. *Venable*, 585 F. 2d 71, 74–75 n.5 (3d Cir. 1978). The only double jeopardy claims that appear to turn largely on the facts are those involving multiple conspiracy charges or collateral estoppel, and the question of who has the burden of proof is rarely outcome-determinative even in that limited category of cases.[3]

3. Little need be said regarding petitioner's claim (Pet. 18–21) that the current indictment should be

[3] Even under the Third Circuit's view, the government need only meet its burden by a preponderance of the evidence. See *United States* v. *Inmon*, *supra*, 568 F. 2d at 332. See also *Lego* v. *Twomey*, 404 U.S. 477 (1972). The court's decision in *Inmon* is the first case that has closely analyzed the burden of proof issue. Therefore, consideration of the issue by the Court at this time would appear to be premature.

dismissed on collateral estoppel grounds. As the court of appeals concluded (Pet. App. A–5), "none of the factual issues involved in the second indictment was necessarily found for the defendant in the first trial, as defendant was convicted on all counts." Since petitioner does not dispute this, there is obviously no basis for a collateral estoppel claim. *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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